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IN THE

Supreme Court of the United States  
OCTOBER TERM, 1951

No. 428

PENNSYLVANIA WATER & POWER COMPANY and  
SUSQUEHANNA TRANSMISSION COMPANY OF  
MARYLAND, *Petitioners,*

v.

FEDERAL POWER COMMISSION and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, and PUBLIC SERVICE COMMISSION OF MARYLAND, *Intervenors,*  
*Respondents.*

No. 429

PENNSYLVANIA PUBLIC UTILITY COMMISSION,  
*Petitioner,*

v.

FEDERAL POWER COMMISSION and CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, and PUBLIC SERVICE COMMISSION OF MARYLAND, *Intervenors,*  
*Respondents.*

ON CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

MOTION TO POSTPONE ARGUMENT

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**MOTION TO POSTPONE ARGUMENT**

Consolidated Gas Electric Light and Power Company of Baltimore, Intervenor-Respondent, respectfully moves the Court to postpone the date for argument of these cases,

now set for the week of March 31, 1952, for a period of time sufficient: (1) to enable the Court to pass upon pending Petitions for Certiorari to the United States Court of Appeals for the Fourth Circuit to review a judgment of that court entered January 3, 1952, which petitions were served and filed in this Court on February 23, 1952 and are docketed as Case No. 611, *Consolidated Gas Electric Light and Power Company of Baltimore v. Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission*, and Case No. 612, *Public Service Commission of Maryland v. Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission*; and (2), in the event said petitions for certiorari are granted, to enable those cases to be argued at the same time with the related instant case.

The basic grounds for this Motion are: (1) that certiorari has been granted in the instant case presumably for the reason, among others, that a conflict exists between the decision of the District of Columbia Circuit to be reviewed in the instant case and the decision of the Fourth Circuit in cases Nos. 611 and 612 upon the questions, (a) of the validity of a certain "Safe Harbor Agreement" under the Sherman Act and (b) of the *primary* jurisdiction of the Federal Power Commission to prescribe the Safe Harbor Agreement as a valid rate schedule of a "licensee" and "public utility" subject to its jurisdiction; and (2) that adequate review of the judgment in the instant case requires contemporaneous consideration of a basic element of that decision, namely, the validity of the Safe Harbor Agreement and the soundness of the decision of the Fourth Circuit purporting to invalidate it summarily.

Intervenor-Respondent further alleges:

1. After a plenary investigation begun in 1944 and concluded November 4, 1946, the Federal Power Commission, by formal order, modified the Safe Harbor Agreement as to the rates charged thereunder, and, as modified, approved and ordered it to be filed and observed, *in its entirety*, as

the interstate wholesale rate schedule of Safe Harbor Water Power Corporation. On review, this order of the Commission was affirmed by the Third Circuit on December 30, 1949, in *Safe Harbor Water Power Corporation v. Federal Power Commission*, 179 F. 2d 179, cert. den. 339 U. S. 957, the Third Circuit stating that the Safe Harbor Agreement was "exemplary".

2. The second of the two contracts involved in the instant case constitutes the filed interstate tariff of Pennsylvania Water & Power Company and is referred to as the "Penn Water Contract". As the result of a lengthy investigation begun in 1944 and concluded by orders of the Federal Power Commission dated January 5, 1949, February 28, 1949 and October 27, 1949, this Penn Water Contract was also modified by the Federal Power Commission as to the rates charged thereunder and, excepting any provisions thereof not "in and of themselves lawful", was approved and ordered to be filed and observed as the rate schedule of Penn Water. On review, these orders of the Commission were affirmed in the instant case by the District of Columbia Circuit on July 3, 1951 in *Pennsylvania Water & Power Company, et al. v. Federal Power Commission*, 193 F. 2d 230, cert. granted Feb. 4, 1952.

3. Nevertheless, in collateral attack proceedings instituted by Penn Water against Consolidated in the Maryland District Court (to which the Federal Power Commission was not a party), the Fourth Circuit on September 30, 1950, reversed the District Court and held that the Penn Water Contract was invalid on its face as *per se* in violation of the Sherman Act and certain laws of Pennsylvania, solely by reason of certain provisions contained in that contract (Arts. IV and V thereof). This decision of the Fourth Circuit was rendered in the case of *Pennsylvania Water & Power Company v. Consolidated Gas Electric Light and Power Company*, 184 F. 2d 552, cert. den. 340 U. S. 906 (1950).

4. In later collateral attack proceedings instituted by Penn Water against Consolidated and Safe Harbor in the Maryland District Court, the Fourth Circuit, on appeal, (refusing to permit the Federal Power Commission to intervene as a party in support of the validity of the Safe Harbor Agreement, which it had prescribed) affirmed a *summary declaratory judgment* of the District Court holding the Safe Harbor Agreement invalid on its face as *per se* in violation of the Sherman Act and certain laws of Pennsylvania, because the Safe Harbor Agreement contained certain provisions totally different in character and effect from Arts. IV and V of the Penn Water Contract criticized in the earlier case (which provisions of the Safe Harbor Agreement, we submit, were clearly separable and which have not had any practical effect), and because of the supposed "connection" (not founded in fact) between the Safe Harbor Agreement and the separate and distinct Penn Water Contract.

5. Penn Water and the Pennsylvania Public Utility Commission in their petitions for certiorari in the instant case repeatedly refer to the Safe Harbor case (Nos. 611 and 612) as a "related decision" and a "related case" (Penn Water's petition, pp. 1 and 4); assert that the Safe Harbor contract was "the basis for important features of the order" of the Federal Power Commission herein assailed (P.U.C.'s. petition, p. 7) and that the determination by this Court of the validity of the Safe Harbor contract as well as of the Penn Water contract "is of vital importance to your petitioners" (P.U.C.'s. petition p. 8). In fact Penn Water, in its petition, refers some fifty times to the Safe Harbor contract and the Safe Harbor case, and both petitioners regarded that case as being so closely related to, and conflicting with, cases Nos. 428 and 429 as to have necessitated the filing with this Court of a copy of the Fourth Circuit's opinion in the Safe Harbor case with a letter of transmittal emphasizing such close relationship and conflict. A copy of

such letter of transmittal is attached as an Appendix to this Motion.

In view of these facts, Penn Water and the Pennsylvania Public Utility Commission can have no proper objection to the present Motion, which seeks to have this Court consider the situation with regard to the validity of the Safe Harbor Agreement not in piecemeal fashion but fully, comprehensively and definitively, by simultaneously reviewing the decision of the Fourth Circuit invalidating the Safe Harbor Agreement along with its review of the instant case.

6. There are important procedural questions in the instant case relating to the timeliness of Penn Water in presenting its contention to the Federal Power Commission that the Safe Harbor Agreement and the Penn Water Contract were in violation of the Sherman Act and to Penn Water's failure properly to exhaust its administrative remedies with regard to those questions. For this reason, the issues as to which conflict exists between the District of Columbia Circuit and the Fourth Circuit, namely, the legal validity of the Safe Harbor Agreement and the primary jurisdiction of the Federal Power Commission to prescribe the Safe Harbor Agreement as the rate schedule of Safe Harbor, may not be reached in the instant case. These basic and important issues, as to which clear conflict exists, are, however, directly involved in cases Nos. 611 and 612 and must be resolved if certiorari is granted.

7. Under the Rules of this Court, Respondents Penn Water and Pennsylvania Public Utility Commission must file any briefs in opposition to the Petitions for Certiorari pending in cases Nos. 611 and 612 on or before March 24, 1952. In order to avoid any undue delay in the disposition of the instant case, Consolidated represents that, if this Motion is granted, it will serve upon the Respondents, a draft of its brief in Case No. 611 within one week after

certiorari is granted therein, and it has been assured by counsel for the Public Service Commission of Maryland that a draft of that Commission's brief in Case No. 612 will be similarly served within the same period. If this is done, ample time will be provided the Respondents in those cases to prepare and file their briefs without unduly delaying the hearing and argument in these cases and in Cases Nos. 428 and 429 in which certiorari has already been granted.

For the above reasons, it is respectfully prayed that this Motion be granted.

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Electric Light and Power Com-  
pany of Baltimore.*

## APPENDIX

January 14, 1952.

Honorable Charles Elmore Cropley, Clerk,  
Supreme Court of the United States,  
Washington, D. C.

Re: No. 428, Pennsylvania Water & Power Company, et al. v. Federal Power Commission, et al  
Re. No. 429, Pennsylvania Public Utility Commission v. Federal Power Commission.

Dear Sir:

In petitions for a writ of certiorari filed November 16, 1951, petitioners referred to a decision of the District Court for Maryland, Bryan, J.; and the holding by that Court that the Safe Harbor contract is illegal under the Federal antitrust laws, Pennsylvania statutes, common law and public policy and that the Federal Power Commission does not have authority to validate that illegal contract.

On appeal, this decision has just been affirmed by the Court of Appeals for the Fourth Circuit in its opinion of January 3, 1952, attached hereto. The Court of Appeals for the Fourth Circuit in this opinion followed in all respects its prior decision with respect to the Penn Water contract, as to which decision certiorari was denied by this Court, 340 U. S. 906 (1950).

The Court of Appeals for the Fourth Circuit, in this current opinion, also confirms the conflict between (a) its prior decision holding that the Penn Water contract is illegal under the Federal antitrust laws, Pennsylvania statutes, common law and public policy and that the Federal Power Commission does not have authority to validate that illegal contract, as to which decision certiorari was denied by this Court as set forth above, and (b) the majority decision of the Court of Appeals for the District of Columbia Circuit, as to which certiorari is being sought by petitioners and which involves the illegal Penn Water contract and the illegal Safe Harbor contract and holds that the Federal Power Commission can perpetuate such illegal arrangements.

The Court of Appeals for the Fourth Circuit in the attached opinion expressly confirms such conflict by stating at pages 17 to 19 its disagreement with the majority decision of the District of Columbia Circuit Court and its agreement with the opinion of the dissenting minority of that Court.

Since the attached Court of Appeals opinion will not be officially reported for some time, it is submitted herewith for the convenience of the Court.

Respectfully submitted,

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cc: Solicitor General of the United States  
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